

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1458

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

-against-

ANTHONY VIVelo

Appellant.

*On Appeal From The United States District
Court For The Eastern District Of New York*

Appellant's Brief

MICHAEL P. DIRENZO
Attorney for Appellant Anthony VivelO
15 Columbus Circle
New York, New York 10023
(212) 541-7740

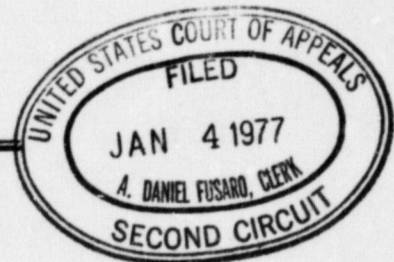


TABLE OF CONTENTS

	<u>Page</u>
Table of Cases	1
Preliminary Statement	1
Statement of Issues Presented for Review	2
Statement of Facts	3
Point I	
- THE INDICTMENT SHOULD BE DISMISSED BECAUSE OF THE "TAINT" ATTACHED TO IT BY THE GOVERNMENT'S USE OF THE IMMUNIZED FEDERAL GRAND JURY TESTIMONY OF THE APPELLANT	9
Point II	
- THE DESTRUCTION OF THE NOTES OF THE GOVERNMENT CASE AGENT AND A DETECTIVE RICHARD CORBETT WAS REV- ERSABLE ERROR	15
Conclusion	
- THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED	18

TABLE OF CASES

	<u>Page</u>
Brady v. Maryland, 373 US 83 (1963)	16
Kastigar v. U.S., 406 U.S. 411 (1972)	10
U.S. v. Harris, _____ F2d _____; 20CrL2049 (dec. 9/23/76)	15
U.S. v. Harrison, 524 F2d 429 D.C. Cir (1975)	15,16
U.S. v. Hinton, _____ F.2d _____; 20CrL 2057 (dec. 9/27/76)	11,13
U.S. v. Johnson, 525 F2d 999, 1003, 1004 (2d Cir. 1975)	15
U.S. v. Kurzer, 534 F2d 511 (2d Cir. 1976)	14
U.S. v. Tramunti 500 F.2d 1334 (2d Cir. 1974)	13
Brown v. United States 245 (Fed. 2d 549)	14
People v. Monaghan (Decided Oct. 27, 1975)	14

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

76-1458

ANTHONY VIVELO,

Appellant.

-----X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal on behalf of the above named appellant, ANTHONY VIVELO, from a Judgment of Conviction in the United States District Court, Eastern District of New York, Honorable Edward R. Neaher, U.S.D.J., and the jury, convicting the Appellant of Violation of Title 42, USC Section 3631; and Violation of Title 18 USC Section 1623.

That thereafter, the Appellant was sentenced by the Honorable Edward R. Neaher on September 24, 1976 to 18 months imprisonment on count 1, one year on count 2 and one year on count 5, the sentences on counts 2 and 5 to be served concurrent with count 1.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should the Indictment be dismissed because of the "taint" attached to it by the Government's use of the immunized Federal Grand Jury testimony of the Appellant?
2. Is the destruction of the notes of the Government Case Agent and a Detective Richard Corbett reversible error?

STATEMENT OF FACTS

The first Government witness CARL T. SCHLICHTINGER testified as follows:

That he was a Real Estate Broker (A89); and a self employed under the name of Willow Creek Realty Company (A90). In November of 1971 he bought premises No. 351 Milton Avenue, Staten Island, New York for resale purposes (A104). That on or about March 7th, 1972, Mr. and Mrs. Charles were shown the property by a salesman of the witness (A119). That thereafter, an agreement was entered into between Mr. and Mrs. Charles and the witness to purchase the premises for \$37,000.00 subject to the obtaining a mortgage in the sum of \$33,750.00 (A124). On or about April 6th, 1972 because the mortgage deal fell through, Mr. and Mrs. Charles entered into a lease agreement with an option to buy said premises (A127-128). Mr. and Mrs. Charles gave a check in the sum of \$650.00, for one month's rent and one month's security (A128). The check was post-dated and failed to clear the bank because of insufficient funds (A129).

NOTE: A motion to dismiss the substantive counts was then made because no valid contract was entered into between Mr. and Mrs. Charles and the witness. Said motion was denied (A130-131).

The witness then testified that on April 7th, 1972, Mr. and Mrs. Charles called him and advised him that the windows in the front of the building had been hit by "gunshot" (A152). The witness then testified as to a meeting in his office on April 9th, involving members of the neighborhood in which the gist of the conversation was that black people would not be allowed on the block (A153-157). The witness did not identify the defendant

VIVERO as being at that meeting. On April 13th, 1972, the witness was called by the police and went to the premises. He found that the windows were broken in the basement and water had been turned on in all of the faucets. There was severe water damage in the house (A161). On or about April 21st or April 22nd, 1972 there was a fire at the premises (A161).

The witness then stated that on April 21st, 1972 HE RECEIVED A CALL FROM THE DIME SAVINGS BANK THAT THE mortgage application of the Charles People had been approved (A162). Some time in January, 1973, after the house had been repaired, Mr. and Mrs. Charles advised the witness that they no longer wished to purchase the house (A164).

Cross examination of the witness was as follows:

That he was being investigated by the Department of State for "block-busting" (A185). That the investigation started in June, 1972, after the fire (A186).

That there was a racially mixed project some three to four blocks away from the premises in question (A202-203).

The next witness was Mr. Alberto Charles who testified as to his dealings with the previous witness in a consistent manner with said witness (A204-233).

Cross examination of Mr. Alberto Charles revealed that there were false statements made in the application to the Dime Savings Bank by the witness (A234-238).

The witness further stated that he had been threatened by one Gerald Maddalone on the first day he went to the premises No. 351 Milton Avenue (A239-241).

The next witness for the Government was Mrs. Dorrell Charles, the wife of Alberto Charles, who testified essentially in line with the first two witnesses (A242-266).

The next witness for the Government was Gerald Maddalone who testified as follows (A267):

That he had entered into an agreement with the Government to be a witness for the Government (he was named as a co-conspirator but not as a defendant) (A274). That the agreement would be that he would be prosecuted for a misdemeanor and that the Government would recommend that he be retained in his job as a police officer (A276).

Maddalone testified that at the beginning of April, 1972, he returned home from work and saw a group of people across the street from 351 Milton Avenue. The people present were Mr. Anzalone, and all of the other co-defendants in the instant action (A285). One of the men pointed to the premises, and the witness observed that the front windows had small holes in them (A286). The witness observed Mr. Anzalone, Mr. Lombardi and Mr. Vivello with BB guns (A287). The witness observed Mr. Lombardi facing the house with a gun in his hand (A287). He heard one release of air at that time (A288).

Thereafter the witness and the four defendants went to the kitchen of Vivello's house where a discussion was had as to the stopping of the Charles family from moving in (A288). The witness stated that either Mr. Vivello or Mr. Anzalone said the only way to stop the family from moving in was to burn down the house (A290). No agreement was reached as to what suggestion should be followed (A291).

Immediately after leaving the visit, without notice to anyone, Maddalone went to his house, got a jar of paint and threw it on the front door of 351 Milton Avenue (A292), (A328).

That sometime thereafter, in April of 1972, Barbieri and the witness had a conversation about some men doing some damage to the house that night (A311). That the witness went to the door and saw two figures running on Milton Avenue whom he could not identify (A312). The witness heard the sound of running water (A313). The morning after, the witness was with Mr. Anzalone and Mr. Lombardi and the witness believed that Mr. Anzalone told him that they had done the damage to the house the night before.

On the same night, subsequent to the fire, VIVELLO invited the witness over to his house (A315). The night of the fire, the witness had a conversation with Anzalone and he stated that he called for the fire engines.

NOTE: Agent Savadel was called as a witness during the cross examination of Maddalone concerning the 3500 material with reference to said witness (A316). Agent Savadel stated that he interviewed Maddalone for the first time at the U.S. Attorney's office on March 3rd or 4th, 1974 and that prior to that he interviewed him at his home on February 19th, 1974 (A317). Agent Savadel stated that he destroyed the original notes of said interview after dictating same by authority of the Assistant Attorney General in charge of the Criminal Division (A320).

A motion to dismiss because of the destruction of said notes of interview of Maddalone was made and denied (A321-323).

Cross examination of the witness Maddalone continued and he stated that he never saw VIVelo shoot a BB gun on the night in question. The witness testified that no agreement was reached in Vivelos house after the alleged shooting incident (A327). Maddalone stated that it was his own idea to splash paint on the door of 351 Milton Avenue and that he never brought it up to the others at the meeting (A328). He further testified on direct examination that he could not be positive that either Vivelos or Anzalone stated the only way to stop the family from moving in, was to burn down the house.

An agreement was reached that something had to be done to stop the Charles from moving into the house. There was no agreement as to suggestions to be followed for this purpose. (A332).

The witness further testified that Anzalone told him that he called the Fire Department to report the fire and received a "hard time" from the Fire Department (A354).

The next witness called for the Government was Nancy King who testified as follows:

That at the beginning of April, she saw the four defendants across the street from 351 Milton Avenue (A355). That she saw the four men shoot at the windows of the empty house (A356).

That she lied to Agent Savadel when interviewed by him in February of 1974 (A359). That she saw the witness Maddalone with or near the said group of men (A379-380). Cross examination of Nancy King showed that Agent Savadel made notes of their conversation (A381). That in November of 1974 after talking to Maddalone and his wife (the wife being the witnesses' sister), the witness,

Nancy King, changed her story to Agent Savadel. In November, 1974, the witness told Agent Savadel that she "figured" that the men were shooting at the front windows of 351 Milton Avenue (A395). That she opened her window at approximately 11:00 or 11:30 p.m. on the night in question to make her observation (A399).

The Assistant U.S. Attorney then read into the record the questions and answers with respect to Count 4 of the Indictment relating to Albert Anzalone (perjury) (A400-401) and Count 9 of the Indictment (perjury) (A402-405).

A tape recording which was made on April 22nd, 1972 which contained two telephone calls made by Anzalone to the Fire Department at 2:14 a.m. and 2:18 a.m. to report the fire was played into evidence. The second call (by a female) gave the Anzalone address as the point of origin of the call to wit: 343 Milton Avenue (A406).

The next witness for the Government was Robert Glaser, who testified that he saw Mr. VIVELLO in the street at the time the fire occurred. That Mr. Anzalone came over to Mr. Glaser and his parents and advised them that he had called the Fire Department (A407-408).

The next witness for the Government was Detective Richard Corbett (retired) who testified as follows:

That on April 22nd, 1972 at about 9:00 p.m., he went to the premises 351 Milton Avenue (A409-412), that during the course of his investigation he found on the kitchen floor a quart size can which the witness characterized as "About the size commonly used to start charcoal fires" (A412). That he found another similar can in the rear yard of the premises (A413). That both cans were

analyzed by the police laboratory and the results were negative (A413).

That the witness had destroyed the original notes with reference to his inquiry (A432).

The Government then called Anthony Romero, a Fire Marshal who testified as follows (A433):

That Mr. Anzalone had told him that he had called the Fire Department but did not tell the Fire Department where the fire was, for the reason that he did not want to get involved (A434).

The Government then rested in its case.

The defendant, ANTHONY VIVelo, did take the witness stand and denied participation.

POINT I

THE INDICTMENT SHOULD BE DISMISSED BECAUSE
OF THE "TAINT" ATTACHED TO IT BY THE
GOVERNMENT'S USE OF THE IMMUNIZED FEDERAL
GRAND JURY TESTIMONY OF THE APPELLANT

The appellant was called to testify before a Federal Grand Jury for the Eastern District of New York at which time he was given use immunity. It is to be noted that the same Federal Grand Jury which gave the Appellant use immunity is the Grand Jury which indicted him for the charges contained in the instant indictment.

This state of facts was immediately called to the attention of the Court prior to trial by motions made on May 3, 1976 and which are contained on pages A21-A88 of the Appendix. Trial counsel for appellant did not move for a "taint hearing" directed to the

use by the Government of the immunized testimony. The appellant, Anzalone, did and a hearing on said motion was granted and testimony was taken on June 15, 1976 and on July 15, 1976 before the Trial Judge. Said testimony appears on pages A460-A506, of the Appendix. After said hearing all motions were denied by the Honorable Edward R. Neaher on July 28th, 1976. (Note: hearing was continued until September 15.)

It is respectfully submitted that the Government has not complied with the requirements of Kastigar v. U.S. 406 US 411 (1972) in affirmatively proving that its evidence against the Appellant was derived from a wholly independent source.

The facts will clearly show that the immunized Federal Grand Jury testimony of the Appellant was so intertwined in the finding of the within indictment, that same could not be separated therefrom.

In examining the affidavit of Assistant U.S. Attorney Ronald E. DePetrakis dated March 9, 1976, which is set forth on pages A459 of the Appendix, the following facts appear:

1. On August 19, 1974 the instant case was assigned to Assistant U.S. Attorney DePetrakis. That Mr. DePetrakis in his review of the file examined the memoranda made by the Assistant U.S. Attorney in the summer of 1973 and the spring of 1974.

2. In September 1974 one Seth Kaufman, a law student assigned to Mr. DePetrakis read the testimony of Anzalone before the State Grand Jury. Mr. Kaufman drafted questions for use by Mr. DePetrakis in questioning Anzalone before the Federal Grand Jury.

It is interesting to note that throughout the affidavit of Mr. DePetrìs he attempts to avoid the issue of "taint" by stating that though at least five people in the U.S. Attorney's office directly concerned with the presentation of Anzalone's case to the Federal Grand Jury, they all found Anzalone's testimony before the State Grand Jury "essentially worthless". This is the same position taken with reference to Vivaldo and his Federal Grand Jury testimony.

It is respectfully submitted that the case at bar falls clearly in line with this Court's ruling in U.S. v Hinton, F.2d, 20 CrL 2057 (2d Cir.-decided September 27, 1976).

In Hinton, supra, the Government argued that the evidence underlying Hinton's indictment was obtained or derived from an independent source because:

1. Hinton's testimony was entirely self-exculpatory.
2. She was indicted nearly two years after giving her immunized testimony.
3. The evidence incriminating Hinton came primarily from one James, who testified before the Grand Jury prior to Hinton, and also came from wiretaps.

In answer to these questions, this Court held as follows:

"At first glance, it would seem that where the indictment is returned by the same grand jury which heard the defendant's immunized testimony, it would be virtually impossible for the Government to show that it had an independent source for the indictment's evidentiary base***.

Here the issue is complicated by the government's claim that Hinton gave no incriminating testimony before the grand jury and did not admit any knowing involvement in the facts and circumstances later charged in the indictment. Thus, the government claims, it was not necessary for her testimony to form a factual predicate for the indictment. However, the Assistant U.S. Attorney admitted on oral argument that it was not until after her testimony that he realized the full extent of her involvement in the drug scheme." 20 CrL 2058.

This Court goes on to state that the evidentiary basis for the indictment of Hinton could not be shown to be "wholly independent of the compelled testimony" and stated as follows:

"We cannot agree with the trial judge that the Government has satisfied its burden of demonstrating a "wholly independent" source for the evidence upon which Hinton's indictment was grounded. Even if Hinton in her testimony before the grand jury substantially denied any involvement in the conspiracy, that denial does not preclude the possibility of improper use against her of her testimony. A juror can draw an inference of a witness's guilt from either a confirmation of, or a denial of participation in, acts about which he is questioned. For instance, if witness X denies involvement in a situation in which one or several other witnesses have already confirmed X's participation, the jurors could reasonably draw an inference that X had not truthfully testified about the incident. Distrust of his testimony on that one point could reasonably lead the jurors to distrust all or a large part of X's testimony on other matters. If witness X had kept silent, or had been permitted to assert his Fifth Amendment privilege, those negative inferences would have been precluded.

We are thus unpersuaded by the Government's contention that the evidentiary basis for the indictment of Hinton was derived in toto from the testimony of Donald James and the

wiretaps. While that evidence may have been incriminating, it is difficult, if not impossible, to determine, without questioning the grand jurors themselves, whether, standing alone, it would have justified the indictment of Hinton. The Government found it necessary to call Hinton under grant of immunity after James had testified, and this would tend to indicate his testimony was not sufficient to inculcate her, and the jurors needed to have her face them before deciding to indict." 20 Cr L 2058

In dismissing the Hinton indictment, the Court stated as follows:

"We believe that as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced. The procedure is so fraught with applicable constitutional problems and with the potential for abuse that in our supervisory power over the administration of criminal justice in the district courts of this circuit, cf. *U.S. v. Toscanino*, 500 F.2d 267, 15 CrL 2253 (2d Cir. 1974), we are compelled to conclude that the procedure the Government adopted here falls outside the bounds of permissible prosecutorial conduct. Accordingly, we reverse the conviction of appellant Hinton and instruct that the indictment be dismissed as to her." 20 CrL 2058

This Court's reasoning in *Hinton*, *supra*, is clearly applicable to the case at bar. For in the case at bar not only did the Federal Grand Jury indict Vivero for the substantive Count of 42 USC §3617; but also indicted him for violation of 18 USC §1623 (false declarations before a Grand Jury).

The argument proffered by the Government that the immunized testimony of Anzalone and Vivero is not protected because it is "false" (*U.S. v. Tramunti* 500 F.2d 1334 (2d Cir 1974)), is also specious. For if a defendant such as Vivero is indicted

for making false statements before a Grand Jury, the statements themselves become the issue of fact to be ultimately determined at a trial. This Court disposed of such an argument in U.S. v. Kurzer, 534 F2d 511 (2d Cir 1976). In Kurzer this Court held:

"But the Government's argument here goes much further, for it would permit the use, if the prosecutor felt the immunized witness was not truthful in all respects, not only of the false testimony, but also of the truthful and incriminatory." Id. at page 518.

The government's position is that prior to Vivaldo's appearance before the Federal Grand Jury, where he was granted use immunity, the Government already had the evidence necessary to present to a petit jury.

The question then arises as to why he was called before a Grand Jury? It seems obvious that the United States attorney hopefully felt that his testimony would form the basis for a false statement criminal violation.

This is in violation of the rule enunciated in Brown v. United States, where the court stated:

"Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." Brown v. United States, 245 F2d 549,555.

Also, see People v. Monaghan, decided by Judge Leff, in the Supreme Court New York County, on Oct. 27th, 1975.

For these reasons it is respectfully submitted that the within indictments should be dismissed.

POINT II

THE DESTRUCTION OF THE NOTES OF
THE GOVERNMENT CASE AGENT AND A
DETECTIVE RICHARD CORBETT WAS
REVERSABLE ERROR.

After the case agent Vincent Savadel testified to the fact that he destroyed the original notes concerning the interviews of the chief Government witness Gerald Maddalone (A320); a motion to dismiss because of the destruction of said notes of said interview was made and denied (A446-448). It has been held in this Circuit that the rough notes taken by a Government Agent in an interview are discoverable. U S. v. Johnson 525 F2d 999, 1003, 1004 (2d Cir. 1975).

The Court of Appeals for the Ninth Circuit in U.S. v. Harris, 20 Cr L 2049 (decided September 23, 1976) held that it is the Court's, not the investigators or prosecutor who make the decision as to whether evidence is discoverable, and that this decision can not be made if the evidence has been destroyed. Id. at page 2050.

In U.S. v. Harrison 524 F2d 429 D.C. Cir (1975) the Court held:

"It seems too plain for argument that rough notes from any witness interview could prove to be Brady material. Whether or not the prosecution uses the witness at the trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy

would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports. The 302 reports contain the agent's narrative account of the witness's statement, prepared partly from the rough notes and partly from the agent's recollection of the interview. Although the agents are trained to include all the pertinent information in the 302 report, there is clearly room for misunderstanding or outright error whenever there is a transfer of information in this manner. In the best of good faith, the statement as recorded in the 302 report may to some degree at least, reflect the input of the agent. In such a situation, the information contained in the rough notes taken from the witness himself might be more credible and more favorable to the defendant's position."

The clear reason given by the Court in Harrison, supra, were that the rough notes of the government agent are not only necessary to respond to the Jencks Act (18 USC §3500) but may also be Brady material (Brady v. Maryland 373 US 83 (1963)).

In the case at bar the major witness for the Government was Gerald Maddalone. It is respectfully submitted that the destruction of the case agent's notes with reference to him was the appellant's prejudicial error.

Further, in considering this point the Court is most respectfully asked to consider the issue of spoliation. There is no doubt but that the original notes were destroyed intentionally. This creates a presumption that the notes mutilated were unfavorable to the spoliator.

Sect. 91 of Richardson on Evidence 9th Edition is set forth herein, in support of said argument.

Richardson on Evidence 9th Edition

§91. Presumption Arising from Spoliation or Fabrication of Evidence.

The intentional destruction or mutilation of relevant evidence may give rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator. Matter of Eno 196 App. Div. 131, 163, 187 N. Y. S. 756, 779; Armour Gaffey, 30 App. Div. 121, 126, 51 N. Y. S. 846, 849, aff'd. 165 N. Y. 630, 59 N. E. 1118; cf. People v. Betts, 272 App. Div. 737, 74 N. Y. S. 2d 791, aff'd 297 N. Y. 1000, 80 N.E. 2d 456. The mutilation or destruction is not alone sufficient to serve as a basis for this inference; the act must have been intentional, and the matter mutilated or destroyed must be shown to be relevant to the issues on the trial. Matter of Eno, supra.

Fabrication or deliberate mutilation of evidence or other fraud on the part of a party is a circumstance that may properly be considered by the jury as indicating a weak cause. Thus, evidence is admissible to show the attempted bribery of a witness. Cruikshank v. Gordon, 118 N. Y. 178, 187, 23 N.E. 457, 459; Nowack v. Met. St. Ry. Co., 166 N. Y. 433, 60 N.E. 32. The subject is further considered in sections 172, 297, 324, infra.

There is no doubt but that the destroyed notes were material and relevant to the issues at trial.

As to facts showing spoliation, Ford on Evidence sets forth the following:

§ 123. Facts Showing Spoliation or Corruption

All things are presumed against a spoliator (omnia praesumuntur contra spoliatores). This maxim applies to a tortious withholding, suppressing, concealing, mutilating, or fabricating evidence or the instruments of evidence. Evidence of spoliation although collateral to the issue is competent. It is, in effect, regarded as an

admission by a party that his whole case is weak. It is not conclusive, for a party may think he has a bad case when in reality he has a good one, but it tends to discredit him and cast doubt upon his position. Such evidence is admissible against a principal, where the acts of spoliation are done by an agent with actual express authority.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED AND THE INDICTMENT
DISMISSED.

Respectfully submitted,

MICHAEL P. DIRENZO

Attorney for Appellant
ANTHONY VIVELO

DEC 28 9 55 AM '76

EAST. DIST. N. Y.

*Paul
Graham*

